Supreme Court, U.S.
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In The

Supreme Court of the United States

ANTONIO CIRAULO,

Petitioner,

v.

THE STATE OF MICHIGAN,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Michigan

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER PETITIONER'S RIGHTS, DUE PROCESS OF LAW, AND EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED BY THE PROSECUTION'S FAILURE TO DISCLOSE, AND HIS TRIAL ATTORNEY'S FAILURE TO DISCOVER, PSYCHIATRIC RECORDS OF THE PRINCIPAL PROSECUTION WITNESS, INDICATING THAT HE WAS, AT THE TIME OF HIS TESTIMONY, ACTIVELY PSYCHOTIC AND DELUSIONAL, AND POSSIBLY INCOMPETENT TO TESTIFY?

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CITATIONS OF THE DECISIONS BELOW

None of the decisions of the courts below is published in any official or unofficial report. All are contained, in their entirety, in the Appendix to this Petition.

BASIS OF JURISDICTION IN THIS COURT

The Michigan Supreme Court denied Petitioner's timely filed Application for Leave to Appeal on February 29, 2000.

This Court has jurisdiction in this case pursuant to 28 U.S.C. § 1257, because the decision appealed from represents a final judgment rendered by the highest court of a State in which decision could be had, and the Petitioner asserts the deprivation of rights assured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his

> favor, and to have the Assistance of Counsel for his defence.

Amendment XIV, Section 1 of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 8, 1992, Petitioner was found guilty of premeditated first degree murder, MCL 750.316; MSA 28.548, assault with intent to commit murder, MCL 750.83; MSA 28.278, assault with intent to rob while armed, MCL 750.89; MSA 28.284, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), after a jury trial, the Honorable Deborah A. Servitto, Circuit Judge of the Macomb County, Michigan, Circuit Court, presiding, in Case No. 92-0065-FC.

On October 2, 1992, he was sentenced to four terms of life imprisonment in connection with the murder and assault convictions, and three terms of two years' imprisonment in connection with the felony-firearm counts.

Petitioner appealed as of right to the Michigan Court of Appeals, under Docket Number 161594; on May 5, 1995, that Court issued an Order affirming his convictions and sentences. On December 27, 1995, the Michigan Supreme Court denied petitioner's Application for Leave to Appeal under Docket No. 103094.

On September 3, 1998, represented by new counsel, he filed in the Macomb County Circuit Court a Motion for Relief from Judgment under the provisions of Michigan Court Rules (MCR) Chapter 6.500, Michigan's comprehensive post-conviction relief statute, which is modeled on, and the jurisprudence of which generally parallels, the federal habeas corpus provisions. Judge Servitto initially ordered a response from the prosecution, but ultimately denied the motion without hearing testimony, in an Opinion and Order dated February 9, 1999. On March 9, 1999, she denied Petitioner's timely filed Motion for Rehearing. The Michigan Court of Appeals denied Leave to Appeal from that decision on June 15, 1999, under Docket No. 218470, and the Michigan Supreme Court denied leave on February 29, 2000, under Docket No. 115019.

Petitioner's convictions arise out of events occurring in the back room of a Clinton Township travel agency known as Casino Express, in the early morning hours of October 30, 1991. (T 201-202, 301-303).[1] The only witness to those events was Matthew Edmunds, who initially directed police to the scene after he was found, bleeding

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[1] "T" refers to the sequentially numbered, multi-volume transcript of trial.

from a knife wound to the neck, "excited," and "babbling" on Groesbeck Highway between 2:00 and 2:30 A.M. (T 269, 272, 277-278).

According to Edmunds, Petitioner had arrived at Casino Express between approximately 12:00 and 12:30 A.M., along with his girlfriend, Deborah Mills (T 299). Already present, according to Edmunds, were Dennis (Rocky) Graziani, Thomas Gambino, and himself. (T 298). The back room was used for card games, and was also equipped with video machines, and Edmunds testified that Petitioner played video game machines for approximately two hours (T 300-301). At 2:30 A.M., Edmunds testified, Petitioner left the main room and returned with a small gun in his hand (T 301, 303). Edmunds testified that Petitioner ordered him, Mr. Gambino and Mr. Graziani to get up against the wall, and to put their hands up (T 303-304).

He testified that Petitioner then gave the gun to his girlfriend, Deborah, duct-taped the three men's hands and mouths, and went through their pockets. (T 306-311). According to Edmunds' account, Petitioner then went to the kitchen and returned with a cutting board, which he used to attempt to break open one of the video game machines, and then, giving up the effort, turned and stabbed him. (T 311-312).

After being stabbed, he testified, he heard Mr. Graziani say, "Oh, my God Tony, no," followed by running, and "a lot" of shots. (T 313). He testified that when he looked over, he saw that Mr. Gambino was lying on the floor, with his eyes closed, and not moving. (T 314). Fearing that he too would be shot, he said, he fled the

scene through an open door, knocking Petitioner out of the way. (T 315-319).

On the street, Fraser Police Officer Timothy Westphal was directed to Edmunds by a passing motorist. (T 272).[2] Edmunds, in turn, told him that two people had been shot, and that he had been stabbed by "Dago Tony," and that just before the Officer had come up, he had seen his assailant driving south on Groesbeck in a gold Lincoln Continental. (T 281-283, 322-323).

At approximately 3:00 A.M., Petitioner was observed driving such a vehicle onto the Eleven Mile service drive of I-696 and Groesbeck Highway, and was stopped without incident shortly thereafter. (T 399-402). The officers noted spots on Petitioner's pants and jacket, apparent blood stains on the car seat, and a shell casing from a .38 caliber handgun in the ashtray. (T 405, 409, 428, 430).[3] Some, but not all, of the stains were identified as human type AB blood, the same blood type as Edmunds', but different from Petitioner, Gambino, and Graziani; none of

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[2] The motorist was neither identified nor produced at trial, nor was the motorist whom Edmunds claims to have encountered when he ran out of the Casino Express, and who, according to Edmunds, removed some or all of the tape which he claimed to have been on his wrists and mouth. (T 320-321). In any event, while the bodies of Graziani and Gambino were indeed found to have been taped at the wrists and mouth (T 466-474, 524-526), Officer Westphal did not testify to having seen any tape on Edmunds, and no such tape was introduced into evidence.

[3] Bullets taken from the bodies of Gambino and Graziani were identified as having been fired from a single handgun of approximately this caliber, but no weapon was ever produced for examination, or in evidence. (T 680-687).

the stains were positively identified as human blood of type A (Gambino's) or O (Ciraulo's and Graziani's). (T 715-733).

Such other facts as are material to the arguments presented herein will be discussed in the course of the presentation of those arguments.

REASON FOR GRANTING THE WRIT

PETITIONER'S RIGHTS, DUE PROCESS OF LAW, AND EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED BY THE PROSECUTION'S FAILURE TO DISCLOSE, AND HIS TRIAL ATTORNEY'S FAILURE TO DISCOVER, PSYCHIATRIC RECORDS OF THE PRINCIPAL PROSECUTION WITNESS WHICH INDICATE THAT HE WAS, AT THE TIME OF HIS TESTIMONY, ACTIVELY PSYCHOTIC AND DELUSIONAL, AND POSSIBLY INCOMPETENT TO TESTIFY.

Matthew Edmunds's testimony was central to the prosecution's case against Petitioner. Indeed, without it there would have been no case against Petitioner at all, and the jury's evaluation of the credibility of Edmunds was crucial to its verdicts. While the prosecution argued, with partial success, that that testimony found support in the scientific and physical evidence, there was no "smoking gun" in the real evidence, and the jury's verdicts (acquitting Petitioner of half the charges against him, and apparently rejecting at least some of Edmunds's "robbery" story) – returned only after having first announced itself to be unable to agree on any charge (T 745) – confirm that the factual issues were indeed closely drawn.

The trial record reveals that it was apparent to all that Edmunds was not without his deficiencies as a witness. Thus, in his opening statement, the trial prosecutor attempted to prepare the jury for Edmunds' testimony as follows:

> Matthew Edmunds has had some problems in his life, and it may be difficult from time to time for all of us to follow Mr. Edmunds in his testimony; he has a tendency to ramble. He's had a history of mental illness. . . . So, understand if you will, please, that Mr. Edmunds may appear to be different than we are, that Mr. Edmunds may ramble at times, that at times Mr. Edmunds may not be responsive to all of my questions or to Mr. Griem's questions.

(T 186).

While the trial record amply supports the prosecutor's characterization of Edmunds' tendency to ramble, at no point was any information whatsoever developed regarding his history of mental illness. In fact, when, in closing argument, the trial prosecutor adverted to his opening remarks that Edmunds "had a history of some mental problems," and remarked that "there was no getting around that fact," defense counsel objected that there was no evidence of any such mental problems, a statement with which the trial judge agreed, and to which the prosecutor acceded. (T 829-830).

However, as it turns out, there was ample evidence of the witness' prior, and continuing, mental problems readily at hand – evidence which was not disclosed to the defense, which defense counsel failed to ferret out, and which, if it had been presented, would have either kept

Edmunds off the stand altogether, or, at the very least, so undermined his credibility as to render Petitioner's conviction virtually unthinkable.

Macomb County Probate Court File No. 84-763 (the contents of which were filed as an exhibit to the Motion for Relief from Judgment) reflects that Matthew Edmunds was involuntarily committed to mental institutions at least nine times, both before and after he testified at Petitioner's trial in August, 1992 (a tenth involuntary commitment proceeding was dismissed when Edmunds consented to a voluntary admission). He was repeatedly diagnosed as schizophrenic, paranoid type, and the petitions and diagnostic evaluations reveal the kind of pattern of delusional behavior and violent acting out which is typical of the disease.[4] On other occasions, he was

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[4] According to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (1994) ("DSM-IV"), the major disorder schizophrenia consists of at least two of the following symptoms, for at least one month: delusions, hallucinations, disorganized speech (e.g., frequent derailment or incoherence), grossly disorganized or catatonic behavior, negative symptoms (e.g., affective flattening, alogia, avolition). (Only one symptom is required if delusions are bizarre or hallucinations consist of a voice keeping up a running commentary on the person's behavior or thoughts, or two or more voices conversing with each other.) To make the diagnosis, continuous signs of the disturbance must persist for at least 6 months. This 6-month period must include at least 1 month of symptoms (or less if successfully treated) that meet the first criteria (*i.e.*, active-phase symptoms) and may include periods of prodromal or residual symptoms. During these prodromal or residual periods, the signs of the disturbance may be manifested by only negative symptoms or two or more symptoms listed in the first criteria present in an

diagnosed as bipolar, with psychotic features, also arising from episodes of irrational, violent behavior.[5] His sad, and troubling, history may be briefly summarized:

> • July, 1983. Father petitions for hospitalization, stating that Matthew "has threatened my wife, my sons, neighbors, and he has assaulted my daughter and my wife . . . refused to receive medical attention . . . smashed the TV, cabinet, door, windows, punch[ed] the door and thrown plants against the wall . . . thinks we[']re plotting against him." Diagnosed as schizophrenic, and committed on physician's certificate that recites, in part, that he "has no regret with regard to his violent behavior."
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> • August, 1984. Father again petitions: "people are out to kill him . . . attempted suicide . . . insists numbers have various meanings . . . threatened his mother and myself . . . said

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attenuated form (*e.g.*, odd beliefs, unusual perceptual experiences). The diagnosis of schizophrenia, paranoid type is assigned whenever there is a preoccupation with delusions or frequent hallucinations are prominent. "Delusions" are false beliefs that are deeply entrenched and clearly not based in reality and are not consistent with cultural beliefs or the person's level of intelligence and life experiences. Persons cling to these beliefs even after the beliefs are shown to be false. Hallucinations are false perceptions or unreal apparitions. They do not correspond to the stimuli that is present and have no basis in reality. They may be auditory, olfactory, visual, or tactile.

[5] The DSM-IV notes that the clinical presentation of a patient at the height of a manic episode may be indistinguishable from an acute exacerbation of paranoid schizophrenia.

people are telling him to kill himself." Diagnosed as paranoid schizophrenic: "irrational and feels people and especially the Government wants him to kill himself;" "no insight whatsoever into his problems." Committed.

• December, 1988. Mother petitions: "Long history of schizophrenia. Hallucinations while watching T.V. Does not acknowledge his illness." Diagnosed as having "long history of Chronic Paranoid Schizophrenia," finding, among other things, "auditory hallucinations," referred for outpatient treatment, but new petition immediately filed after he "threatened aftercare worker ['wanted to knock that mother fucker's head off'], Doctor and Nurse." Now diagnosed as bipolar: "has grandiose delusions, is suspicious . . . no insight." Consented to voluntary hospitalization.

• February, 1991. Petition filed by police officer: "for no reason attacked a vehicle . . . then physically assaulted vehicle owner w/o provocation . . . then picking up tire iron proceeded to chase and threaten other strangers" and menaced officer with the weapon, swinging it and "threatening to kill." Diagnosed as bipolar: "can not give a reason for" assaults, "is suspicious, guarded, affect expansive . . . easily unstable . . . no insight;" "grandiose and delusional . . . refuses to take his medication. While being evaluated, attacked another patient, who required stitches as a result of the assault: "very psychotic, bizarre . . . behavior is unpredictable, impulsive & sexually inappropriate." Committed.

• March, 1991. Parents filed, one week after discharged from previous commitment: "Talks

to the mirror, threatens to kill people who take his water, babbles on about nonsense . . . was swearing & yelling in the apt. hallway after midnight, talking to no one, abusive & vulgar demanding $ & assaulted his mother and myself knocking me down & hitting her when I didn't have $3.00." Diagnosed bipolar: "Appears to be responding to internal cries. Answers to questions are vague, tangential, and show evidence of idiosyncratic thinking. He is unable to provide any coherent history." Committed.

• February, 1993. Parents petitioned: "out of touch with reality . . . verbally abusive . . . [t]old us the crows speak English to him." Diagnosed with schizo-affective disorder, bipolar type: "denies any psychosis, yet admits to his radio coming on at home by itself;" "hostile, inappropriate, delusional." Committed, but failed to comply with aftercare conditions, and when aftercare provider moved to have him recommitted, it was learned that he had moved to Arizona.

• December, 1994. Police officer petitioned: "attacked his father with a 12" knife stating he wanted to murder his whole family." Diagnosed schizo-affective, bipolar type:" "Patient is loose, circumstantial, and tangential, and appears to respond to internal stimuli." Committed, and prior to discharge hospital petitioned for continued commitment, citing "paranoid delusions." Diagnosed as schizophrenic, paranoid type. Noted that during hospitalization "he is constantly threatening others." Commitment continued for an additional 90 days, and then continued again, for an indefinite period.

- October, 1996. Father petitioned: "extremely verbally abusive & obscene, talks aggressively to his voices." Diagnosed as schizo-affective, bipolar type: "decompensated . . . delusional." Committed.

At each of Matthew Edmunds' commitment hearings, pursuant to Michigan law and practice, the petitioner was represented by an Assistant Macomb County Prosecuting Attorney – a representative of the same office which conducted Petitioner's prosecution.

The continuity of this history, for extensive periods both before and after the incident out of which the charges herein arose, as well as the witness' testimony in Petitioner's trial, strongly suggests that Edmunds was actively psychotic and delusional both at the time of the incident and at the time he testified. This inference was also borne out by the affidavit of Tommy Lee Davidson, which was also submitted as an exhibit to the Motion for Relief from Judgment, which details Edmunds' behavior, at a time roughly contemporaneous with petitioner's trial, as including "talking to himself," and "acting as if he were hearing and seeing things which were not occurring."

In his Motion for Relief from Judgment, Petitioner asked the trial judge to hold an evidentiary hearing on the issues of: (a) whether Edmunds was competent to testify as a witness at Petitioner's trial; (b) whether the prosecution improperly failed to disclose the witness' psychiatric records to the defense; and (c) whether trial counsel rendered ineffective assistance by failing to discover, and use, the facts (and records) regarding the witness' psychiatric history, either to attempt to exclude,

or, at the very least, to impeach, his testimony. The trial court, however, refused to hold any hearing whatsoever, and the Michigan Court of Appeals and Supreme Court upheld this action.

Under Michigan Rule of Evidence (MRE) 601, a person is incompetent to testify as a witness if "the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably." In applying this rule, "[t]he test of competency of a witness does not focus on whether a witness is able to tell right from wrong but, rather, on whether a witness has the capacity and sense of obligation to testify truthfully and understandably." *People v. Norfleet*, 142 Mich. App. 745, 748 (1985).

The witness' psychiatric history contains within it strong suggestions that he lacked such capacity (to distinguish truth from fiction, the real from the imaginary), and that his "sense of obligation" to testify truthfully may have been overborne by psychic motivators (such as irrational fears and "internal cries").[6] Yet no hearing was held on the question of his capacity before or during Petitioner's trial, because the witness' actual psychiatric

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[6] Also relevant in this connection is Paragraph 5 of the Davidson affidavit, which suggests that Edmunds' testimony may have been consciously false: "Affiant learned that Matthew Edmunds had testified in court at preliminary examination in the above case, and afterwards saw Mr. Edmunds point to his neck and say words indicating that he did not know who did this, but if it's him, he'll never get to finish the job."

history was never revealed, and the issue of his incapacity suggested by that history was never raised.

Even if Edmunds had not been found to be incompetent, it is inconceivable that the details of his psychiatric history would not have weighed significantly on the jury's judgment of his credibility in general, and specifically of the credibility of his assertion that he had been nothing more than a victim of, rather than a perpetrator of, the acts of violence which had taken place at the Casino Express. Yet the jury never learned anything of that history.

The Prosecution's Failure to Disclose the Psychiatric History and Records

The prosecution was certainly in possession of the records of the Probate Court proceedings – if for no other reason than the fact that the Macomb County Prosecutor's Office appeared on behalf of the petitioners in those proceedings. Yet the record makes clear that none of the records of these proceedings were disclosed to defense counsel, notwithstanding the fact that more than four months prior to trial defense counsel filed a Motion for Discovery and Inspection that included a request for "All information, materials, records and statements, recorded or otherwise, currently within the knowledge . . . of the Macomb County Prosecuting Attorney . . . which bears on the credibility of the prosecution witnesses . . . including, but not limited to: . . . information regarding the witness's competence and their [*sic*] capacity and opportunity to observe, remember, recall and narrate as well as their character for veracity . . . ." (Motion for Discovery

and Inspection, April 6, 1992, ¶(3)(f)(vii)).[7] Such nondisclosure, Petitioner contended and contends, violated his right to due process of law.

Defendants have a due process right to obtain evidence in the possession of the prosecutor if it is favorable to the accused and material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within th[e] general rule [of Brady]." *Giglio v. United States*, 405 U.S. 150, 154 (1972) (citations omitted). In other words, especially in the case of a crucial witness, "[i]mpeachment evidence, . . . as well as exculpatory evidence, falls within the *Brady* rule." *United States v. Bagley*, 473 U.S. 667, 676 (1985).

"[T]here are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request." *Brady, supra*, 373 U.S. at 110. In such situations, or where the material, though not so obviously exculpatory, has been specifically requested, reversal is required if the suppressed evidence might have affected the outcome of the trial. *United States v. Agurs*, 427 U.S. 97, 104 (1976). This is clearly the applicable standard in

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[7] This factual assertion was initially supported by the affidavit of undersigned counsel, based on his conversations with trial and appellate counsel, and later supplemented by the affidavit of Petitioner's lead trial attorney, which unequivocally states that he "was unaware of the true depth of Matthew Edmunds' mental condition, or of the existence of the Probate Court file . . . ." (Affidavit of David Griem, ¶3).

regard to the information here involved, since its significance was immediately apparent *and* a request for material of this character was specifically made prior to trial.

As noted above, since the Macomb County Prosecutor's Office participated in the Probate Court litigation, it was obviously not only in possession of information regarding that litigation, but also presumably in possession of copies of at least some of the Probate Court documents themselves. While the individual trial prosecutor may or may not have been in possession of the information or documents, such a showing is not necessary to make out a *Brady* claim, since "[t]he government cannot with its right hand say it has nothing while its left hand holds what is of value." *United States v. Wood*, 57 F.3d 733, 737 (9th Cir.1995).

At the same time, the good or bad faith of the prosecution in connection with the nondisclosure is irrelevant: "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady, supra*, 373 U.S. at 87.

Defense Counsel's Failure to Investigate and Discover The Psychiatric History and Records

Of course, Petitioner did not, and does not, maintain that the prosecution affirmatively *suppressed* the records or information regarding Edmunds' psychiatric history, in the sense of taking affirmative action to make it

unavailable to the defense. The information in the Probate Court file was readily available to trial counsel for Petitioner as public records, had he merely looked.

Trial counsel was certainly on notice of the possibility that such records might exist, if not from his own observations of the witness, then at least from the prosecutor's opening statement.[8] Even the most rudimentary investigation would have turned up the records, which would have supported either the exclusion of the witness' testimony altogether, or, at the very least, the basis for a far more effective attack on his credibility. His failure to conduct that investigation, and to discover the basis for mounting such challenges, denied Petitioner the effective assistance of counsel guaranteed him by both federal and State constitutions.

In *Strickland v. Washington*, 466 U.S. 668, 687 (1984), this Court held that under the Sixth Amendment to the United States Constitution, an ineffectiveness of counsel claim must fail unless the defendant can also show prejudice – that counsel's ineffectiveness deprived him of a fair trial. Specifically, *Strickland* requires a showing of "a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different." 466 U.S. at 694. The "reasonable probability" standard is

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[8] At the same time, the prosecutor's casual allusion to Edmunds having had problems in his life cannot serve as the equivalent of the kind of disclosure required by *Brady* and its progeny, if for no other reason than the prosecutor's remarks do not even *suggest* the level of pathology demonstrated by the psychiatric records, much less the kind of details which give those records their crucial significance.

defined as "a probability sufficient to undermine confidence in the outcome." *Ibid.*

There are two prongs to this inquiry: performance and prejudice. As to performance, the question is "whether counsel's assistance was reasonable considering all of the circumstances." *Strickland v. Washington, supra,* 466 U.S. at 688. As to prejudice, "the essential question is whether better lawyering would have produced a different result." *Ward v. United States,* 995 F.2d 1317, 1321 (6th Cir.1993).

Strickland's objective reasonableness prong requires counsel to conduct appropriate factual and legal inquiries and to allow adequate time for trial preparation and development of defense strategies. *See, e.g., Sneed v. Smith,* 670 F.2d 1348, 1353 (4th Cir.1982); *Coles v. Peyton,* 389 F.2d 224, 226 (4th Cir.1968). Counsel must ordinarily "investigate possible methods for impeaching prosecution witnesses," and failure to do so may suffice to prove a claim under *Strickland. Hoots v. Allsbrook,* 785 F.2d 1214, 1221 (4th Cir.1986); *Williams v. Washington,* 59 F.3d 673 (7th Cir. 1995) (failure to pursue leads suggesting principal witness's bad reputation for truthfulness). As the court put the matter in *United States v. Barbour,* 813 F.2d 1232, 1234 (D.C. Cir. 1987):

> Although counsel is permitted great latitude in how he manages his case, his discretion is not limitless. His failure to act on behalf of his client's best interests deprives his client of effective counsel. *See Nuttal v. Greer,* 764 F.2d 462 (7th Cir.1985). At the outset, counsel has an obligation to conduct a reasonable amount of pretrial investigation. *Strickland,* 466 U.S. at 691, 104

> S.Ct. at 2066. *See Nealy v. Cabana*, 764 F.2d 1173 (5th Cir.1985). The amount of investigation depends upon the number of issues presented, the complexity of those issues, and the respective strategies of opposing counsel. *Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir.1985). Only when reasonable investigation has been performed is counsel in a position to make informed tactical decisions. It is especially important that counsel adequately investigate the case in order that at the very least he can provide minimally competent professional representation. As was stated in *Crisp v. Duckworth*, 743 F.2d 580 (7th Cir.1984), "Effective representation hinges on adequate investigation and pretrial preparation . . . [for] investigation may help an attorney develop or even discover a defense, locate a witness or unveil impeachment evidence." *Id.* at 583 (citing *United States v. DeCoster*, 487 F.2d 1197, 1204 (D. C. Cir. 1973)).

The case at bar hinged on the testimony of a single witness, whose testimony could have been excluded, or at least seriously undermined by the records in question. Counsel had every reason to suspect that such records existed, and had he looked in the most obvious place of all, he would have easily found them. His failure to do so cannot be excused as being within the range of acceptable representation, and that such rudimentary efforts would not have been likely to result in a different outcome seems clear beyond peradventure.

The Trial Court's Ruling

The trial judge, however, refused to even hold an evidentiary hearing in the premises. As to the issue of prosecutorial misconduct, she held that "the record is devoid of any evidence establishing that trial counsel was denied access to medical and/or psychiatric records pertaining to Matthew Edmunds." (Opinion and Order, February 9, 1999, p. 4). However, the issue raised in this regard, was whether the prosecution had an affirmative *duty to disclose* the information, and the court wholly failed to address this issue. Although defense counsel was undoubtedly aware, in a general sense, that Edmunds had a history of mental problems, it was impossible for the trial court to determine whether the prosecution had complied with his *Brady* obligations without knowing precisely what information was made available to trial counsel. *United States v. Breit*, 767 F.2d 1084, 1090, n. 4 (4th Cir. 1985) ("We conclude that the government may not discharge its obligations under *Brady* by merely tendering a witness to defense counsel without providing any indication that the witness' testimony may be helpful to defense or, at a minimum, indicating the witness is being tendered pursuant to the government's *Brady* obligation."). *See Jones v. Jago*, 575 F.2d 1164, 1167-68 (6th Cir. 1978); *United States v. Sheehan*, 442 F.Supp. 1003, 1009 (D.Mass.1977); *Emmett v. Ricketts*, 397 F.Supp. 1025, 1043 (N.D.Ga.1975)).

The fact that trial counsel did not act on the information which he *did* have does not mean he would not have acted differently if the information known to the prosecution had been disclosed to him. To truly and fairly determine what was disclosed, and what impact a full

disclosure might have had on the trial process, the trial judge had to hear testimony – precisely the kind of testimony which Petitioner sought to present at the evidentiary hearing he was improperly denied.[9]

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[9] Indeed, as the affidavit of David Griem, submitted in support of Petitioner's Motion for Rehearing demonstrates, trial counsel's testimony would have demonstrated that the unmade disclosures would indeed have had a dramatic impact on counsel's actions, and would in all likelihood have changed the course of the trial proceedings. Paragraph 3 of that affidavit states:

> I was unaware of the true depth of Matthew Edmunds' mental condition, or of the existence of the Probate Court file described in the said Motion and Memorandum; I can recall no strategic reason for failing to obtain the said file, and if I had possessed the said file, I would have used the information therein to attempt to keep Edmunds from testifying, or at least to attack his credibility.

The trial judge held that the averments of the Griem affidavit were not properly before her, since the affidavit had not been filed with the original motion, and Petitioner had provided "no reasonable basis for failing" to do so. (Opinion and Order, March 9, 1999, p. 5). Of course, the substance of the affidavit – that Mr. Griem had not seen the Probate Court material, and could assign no tactical reason for having failed to examine it – *had* been presented to the trial court, by way of the recital of Petitioner's original, verified motion, and by the representations of counsel found at page 3 of the Reply Memorandum, filed November 6, 1998.

Nothing in the Michigan Court Rules required the filing of affidavits in connection with the Motion. The Griem affidavit was filed with the trial court to underscore the point that had apparently eluded the trial judge up to that juncture: the nature of the anticipated proofs. Her refusal to consider it represents not a principled application of the rules of pleading, but an unseemly disinterest in getting to the heart of the matter.

The trial judge brushed aside Petitioner's contentions regarding Edmunds's competence to testify, summarily holding that the "trial record" discloses that Edmunds was a competent witness (Opinion and Order, February 9, 1999, p. 4). This ruling, of course, wholly ignores the fact that, when called upon to do so, the Court is required to conduct an independent inquiry on the question of competence. In the absence of such a hearing, the trial judge simply could not properly draw the conclusion it did.

Most troubling, however, was the trial judge's conclusion that trial counsel's failure to take advantage of – *or even obtain* – Edmunds' psychiatric records was reasonable trial strategy (Opinion and Order, p. 5). This conclusion is simply without support in the record. Indeed, one of the principal reasons why an evidentiary hearing was requested, and is required, is to establish that no such "reasonable strategy" was involved, *as a matter of both fact and law*. The Court could hardly draw conclusions about the actions of trial counsel without hearing from him; this is precisely why the Michigan Supreme Court held in *People v. Mitchell*, 454 Mich. 145, 168-169 (1997) that "the trial lawyer is a necessary witness on the issue of inadequacy of counsel."[10] Moreover, how could trial counsel

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However, Michigan courts routinely consider affidavits filed in support of motions for rehearing in determining the correctness of a trial court's disposition of a matter, *see, e.g., Nelson v. American Sterilizer Co.*, 212 Mich. App. 589, 593 (1995).

[10] The trial judge's wholesale misunderstanding of the issues involved is further demonstrated by her "finding," at page 6 of the Opinion and Order of February 9, 1999, that "appellant [*sic*] counsel's failure to raise the issue on appeal does not constitute ineffective assistance of appellate counsel."

have made a strategic decision, much less an informed or reasonable decision, about whether to use the psychiatric records *without even knowing what the records contained?* And the record makes clear that trial counsel was prepared to testify that he had *no strategic or tactical reason for having failed to obtain or examine the psychiatric records.*[11] Indeed, how could he? How can deliberate ignorance be reasonable strategy – even for an ostrich?

The trial court's refusal to allow Petitioner to present the testimony which would have borne out his claims regarding Matthew Edmunds is simply and clearly insupportable as a matter of law, logic, or common sense.

Appellate Affirmance of the Trial Court's Ruling

The Michigan Court of Appeals denied leave to appeal "for lack of merit in the grounds presented." The Michigan Supreme Court denied leave on the grounds that petitioner "has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)." Although this may, at first blush, appear to represent a decision on the basis of state law, a circumstance which would deprive this Court of jurisdiction on direct appeal, *See, e.g., Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945), this is not in fact the case.

In fact, Petitioner did not contend that appellate counsel was ineffective for failing to raise this issue, nor was he required to do so, since he could hardly have done so on the basis of the trial record, which did not reveal the nature of Edmunds' psychiatric history.

[11] See, Reply Memorandum, November 6, 1998, p. 3; Affidavit of David Griem, ¶ 3.

As noted previously, MCR Chapter 6.500 essentially mirrors the federal habeas corpus model.[12] The Petitioner's Motion for Relief from Judgment, filed under that chapter, raised federal constitutional claims, and was denied, on its merits, by the trial court by reference to federal constitutional standards and the decisions of this Court. There is, in fact, no independent state ground on which the decisions of the Michigan courts can be upheld.

The Importance of The Question Presented

Petitioner's convictions, and his sentences of life in prison without the possibility of parole, rest on the testimony of a single witness, whose competence to testify, and whose credibility, have never been seriously examined. The failure of the prosecution, or of his own attorney, to live up to their constitutional obligations raise fundamental questions as to the integrity of the process which has resulted in his lifetime incarceration.

This case presents important questions regarding the duty of the state to disclose, and the duty of defense counsel to investigate. The constitutional principles involved are of the greatest magnitude. Moreover, the

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[12] MCR 6.508(D), cited by the Michigan Supreme Court, reads in full as follows, does, in fact, state that "The defendant has the burden of establishing entitlement to the relief requested." It also sets forth "cause and prejudice" standards for excusing procedural defaults, as well as an "actual innocence" exception, that are, in the words of the Staff Comments, "based on several decisions of the United States Supreme Court," citing *Wainright v. Sykes*, 433 U.S. 72 (1977) and *United States v. Frady*, 456 U.S. 152 (1982).

issues presented are not unique to Petitioner's case – questions about the rights and duties implicated herein arise with great frequency. The case at bar, however, presents an especially troubling example of what happens when counsel fail in their professional obligations, and the courts of a state fail to adequately redress the consequent violation of federal rights.

CONCLUSION

This Court should grant Certiorari and reverse the decisions of the courts below, with instructions to grant Petitioner a full and fair hearing on his federal constitutional claims.

Respectfully submitted,

DOMNICK J. SORISE
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DATED: May 23, 2000

Order
Entered: February 29, 2000

Michigan Supreme Court
Lansing, Michigan

Elizabeth A. Weaver,
Chief Justice

115019

[Names Omitted In Printing]

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

ANTONIO CIRAULO,
Defendant-Appellant.

SC: 115019

COA: 218470

Macomb CC: 92-00065-FC

On order of the Court, the application for leave to appeal from the June 15, 1999 decision of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

B0222

[SEAL]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 29, 200 0 /s/ Jacqueline B. MacKinnon
Deputy Clerk

Court of Appeals, State of Michigan

ORDER

People of MI v Antonio Ciraulo	Mark J. Cavanaugh Presiding Judge
Docket No. 218470	Henry William Saad
LC No. 92-000065 FC	Peter D. O'Connell Judges

The Court orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented.

/s/ Mark Cavanagh

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on Jun 15, 1999 [Date] /s/ Carl L. Gromek
Chief Clerk

[SEAL]

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF MACOMB

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff,

File No.
92-0065-FC

vs.

ANTONIO CIRAULO,

Defendant.
_____/

OPINION AND ORDER

Defendant Antonio Ciraulo ("Defendant") moves for rehearing and reconsideration pursuant to MCR 2.119(F).

Following a jury trial, Defendant was convicted of first-degree premeditated murder, assault with intent to commit murder, assault with intent to rob while armed, and three counts of possessing a firearm during the commission of a felony. Defendant was sentenced to four terms of life imprisonment for the murder and assault convictions and two years imprisonment for each of the felony-firearm convictions. Defendant's convictions and sentences were affirmed on appeal in an unpublished opinion per curiam dated May 5, 1995. Defendant's application for leave to appeal was denied by the Michigan Supreme Court on December 27, 1995.

In an Opinion and Order dated February 9, 1999, this Court denied Defendant's motion for relief from judgment pursuant to MCR 6.508(D). Defendant now moves

for rehearing and reconsideration of the Court's February 9, 1999 decision.

A motion for rehearing or reconsideration under MCR 2.119(F) is not to be granted unless the motion is filed not later than fourteen days after the challenged decision and the moving party demonstrates a palpable error by which the Court and the parties have been misled and shows that a different disposition of the motion must result from correction of the error. A motion for rehearing or reconsideration which merely presents the same issues ruled on by the Court, either expressly or by reasonable implication, will not be granted. MCR 2.119(F)(3).

In support of his motion for rehearing and reconsideration, Defendant argues the Court was misled by palpable errors relating to the state of the record and the nature of Defendant's claims. Defendant first raises issues relating to the witness Matthew Edmunds ("Edmunds"). Before addressing each sub-issue raised by Defendant concerning Edmunds, the Court notes Defendant's arguments on reconsideration clearly raise the same issues ruled on by the Court in denying Defendant's motion for relief from judgment. Furthermore, as demonstrated below, the Court is satisfied it was not misled, as Defendant contends, by palpable errors relating to the state of the record and the nature of Defendant's claims.

Defendant raises three claims of error concerning Edmunds. First, Defendant contends the Court's conclusion that the record is devoid of any evidence establishing trial counsel was denied access to medical and/or

psychiatric records pertaining to Edmunds manifests a clear misapprehension of Defendant's arguments. According to Defendant, the issue previously raised in this regard does not concern suppression of records. Rather, it concerns whether the People had an affirmative duty to disclose the information. Defendant contends the Court failed to properly address this issue when it denied Defendant's motion for relief from judgment.

As set forth in the Opinion and Order dated February 9, 1999, trial counsel was, without question, aware of Edmunds' psychiatric history. Concomitantly, trial counsel had access, and was never denied access to, Edmunds' medical and/or psychiatric records. Proceeding from this vantage point, Defendant's argument regarding the People's alleged "failure to disclose" is subject to grave foundational and logical shortcomings. Defendant's argument erroneously begins with the assumption that trial counsel possessed no knowledge concerning Edmunds' psychiatric history. This assumption is not supported by the record. In this respect, the Court is hard-pressed to find an affirmative duty to disclose information of which trial counsel was already aware. Trial counsel's failure to use this information in his treatment of the witness Edmunds, or in the alternative, to obtain all information available, reflects a strategic choice. In stating its conclusion regarding the lack of evidence establishing that trial counsel was denied access to Edmunds' records, the Court implicitly addressed both claims of suppression and failure to disclose, as set forth in Defendant's original motion. The Court finds no error in its prior holding.

Defendant next claims the Court erred when it found, on the basis of the record below, that Edmunds was

competent to testify at trial. However, in making this argument, Defendant is raising an issue previously decided by the Court. A motion for reconsideration which merely presents the same issues ruled on by the Court, either expressly or by reasonable implication, will not be granted. MCR 2.119(F)(3).

Additionally, the Court is disinclined to accept Defendant's contention that it cannot properly draw a conclusion in the absence of a hearing to determine competency. As set forth in detail in the Court's prior Opinion and Order, the record does not establish that a hearing to determine competency was necessary. Furthermore, the Court finds no basis to accept Defendant's hollow assertion that it "wholly" ignored its obligation "to conduct an independent inquiry on the question of competence". Defendant makes this allegation of error in the absence of any supporting facts or authority.

Defendant next claims the Court's conclusion that trial counsel's failure to take advantage of – or even obtain – Edmunds' psychiatric records was reasonable trial strategy is simply without support in the record. In this regard, the Court first notes Defendant's characterization of the Court's holding is inaccurate. Specifically, the Court held as follows:

> The trial record reveals effective advocacy on behalf of Defendant. In his cross-examination of Mr. Edmunds, trial counsel effectively raised several discrepancies inherent in Mr. Edmunds' testimony. Trial counsel elected a strategy which did not include questioning Mr. Edmunds' mental history, even though the preliminary examination transcript reveals defense counsel's

> awareness of Mr. Edmunds' mental history. While defense counsel's strategy regarding Mr. Edmunds may now appear questionable when viewed with the benefit of hindsight, the Court cannot say trial counsel performed below the standards of a reasonably competent attorney. The Court is not persuaded trial counsel's failure to question Mr. Edmunds regarding his mental history constitutes ineffective assistance of counsel. [February 9, 1999 Opinion and Order, p 5-6.]

The Court will not revisit this issue on reconsideration. Furthermore, the Court is not persuaded reconsideration is warranted in light of the affidavit submitted by trial counsel David Griem. The Court has reviewed the statements made by trial counsel in his affidavit and, as previously determined, the Court is not persuaded counsel's performance fell below an objective standard of reasonableness under prevailing norms or that the representation so prejudiced Defendant as to deprive him of a fair trial. See *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Moreover, Defendant's submission of the affidavit upon reconsideration is improper. Defendant provides the Court with no reasonable basis for failing to submit this affidavit in connection with Defendant's original motion for relief from Judgment. The standard upon reconsideration is whether the parties or the Court were laboring under any sort of palpable error at the time the Court decided the original motion. See *Saginaw v Hargrove*, 169 Mich App 594, 599; 426 NW2d 720 (1988). At the time the Court denied Defendant's motion for relief from judgment, trial counsel's affidavit was not before the Court.

The Court is also not persuaded an evidentiary hearing on the issue of effective assistance of counsel is required. The decision whether to conduct an evidentiary hearing is within the discretion of the Court. MCR 6.508(B). Furthermore, Defendant misconstrues the applicability of *People v Mitchell*, 454 Mich 145, 168-169; 560 NW2d 600 (1997) to this case. *Mitchell* provides that "the trial lawyer is a necessary witness on the issue of inadequacy of counsel" within the context of waiver of the attorney-client privilege. *Mitchell* does not stand for the proposition that an evidentiary hearing is mandatory where the Defendant asserts ineffective assistance of counsel as a basis for postappeal relief.

In denying Defendant's motion for relief from judgment, this Court also found no merit in Defendant's claim that he was denied effective assistance of counsel resulting from trial counsel's failure to obtain an interpreter for Defendant and appellate counsel's failure to raise the issue on appeal. Upon reconsideration, Defendant makes two claims of error in connection with this issue. First, Defendant contends that the Court failed to address the principle issue raised by Defendant; namely, that Defendant was incompetent to stand trial without the assistance of an interpreter. Second, Defendant claims the Court misperceived the nature of the question involved as to Defendant's competence when it confined its discussion of the issue to the determination of trial counsel's alleged ineffectiveness in not securing the services of an interpreter.

In evaluating the allegations of error claimed by Defendant, the Court first redirects Defendant's attention to its ruling in this regard:

> The Court also finds Defendant's claim that he was denied effective assistance of counsel resulting from trial counsel's failure to obtain an interpreter for Defendant and appellate counsel's failure to raise the issue on appeal is without merit. The issue of whether trial counsel's failure to obtain an interpreter for Defendant constituted ineffective assistance of counsel was decided against Defendant in a prior appeal. Appellate counsel raised the issue of Defendant's competency to stand trial due to alleged linguistic barriers. In an unpublished opinion per curiam dated May 5, 1995, the Court of Appeals held that trial " . . . counsel's failure to obtain an interpreter for defendant did not constitute ineffective assistance because the record shows that defendant understood and spoke English." See *People of the State of Michigan v Antonio Ciraulo,* unpublished opinion per curiam of the Court of Appeals, decided May 5, 1995 (Docket No. 161594). Consequently, the Court may not grant relief on this basis as Defendant's motion alleges grounds for relief which were decided against Defendant in a prior appeal. MCR 6.508(D)(2). [February 9, 1999 Opinion and Order, p 6-7.]

The Court also rejects Defendant's attempt on reconsideration to revisit the issue of competence. This issue was resolved by the Court when it denied Defendant's motion for relief from judgment. Furthermore, the Court did not misperceive the nature of the issue raised by Defendant. Rather, the Court declined to accept Defendant's representation of the "true" issue at hand. The essential issue before the Court is whether trial counsel's failure to obtain an interpreter for Defendant constitutes

ineffective assistance of counsel. This issue was decided against Defendant by the Michigan Court of Appeals. Defendant's claim regarding the Court's "fundamental misperception of the nature of the question involved" is merely an attempt to avoid the bar to relief set forth in MCR 6.508(D)(2). For this reason, the Court is satisfied its original ruling does not constitute error warranting reconsideration.

In closing, Defendant also assigns error to the rulings made by the Court in reference to Detective Steckman's testimony. However, Defendant's motion for reconsideration merely presents the same issues ruled on by the Court when it denied Defendant's original motion for relief from judgment. Moreover, the Court has clearly indicated its disinclination to consider the affidavit submitted by trial counsel in connection with Defendant's motion for reconsideration. For these reasons, the Court will not revisit this issue.

In conclusion, and for the reasons set forth above, Defendant's motion for rehearing and reconsideration is DENIED pursuant to MCR 2.119(F). In compliance with MCR 2.602(A)(3), effective December 1, 1998, the decision of the Court resolves the last pending claim and closes the case.

IT IS ORDERED.

/s/ Deborah A. Servitto
HONORABLE
DEBORAH A. SERVITTO

/AL

DATED: March 9, 1999

cc: ROBERT BERLIN
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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF MACOMB

PEOPLE OF THE STATE OF
MICHIGAN,

Plaintiff,

vs.

File No.
98-0065-FC

ANTONIO CIRAULO,

Defendant.
_____/

OPINION AND ORDER

Defendant Antonio Ciraulo ("Defendant") moves for relief from judgment pursuant to MCR 6.500 *et seq.*[1]

Following a jury trial, Defendant was convicted of first-degree premeditated murder, contrary to MCL 750.316; MSA 28.548; assault with intent to commit murder, contrary to MCL 750.83; MSA 28.278; assault with intent to rob while armed, contrary to MCL 750.89; MSA 28.284; and three counts of possessing a firearm during the commission of a felony, contrary to MCL 750.227b; MSA 28.424(2). Defendant was sentenced to four terms of life imprisonment for the murder and assault convictions and three terms of two years imprisonment for the felony-firearm convictions, which were to run concurrently

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[1] The People were directed by the Court to file a response to Defendant's motion for relief from judgment. See file entry dated 10/9/98. In accordance with MCR 6.506, the People have filed a response. The People seek denial of Defendant's motion.

with each other but consecutively to Defendant's other sentences. Defendant's convictions and sentences were affirmed on appeal by the Michigan Court of Appeals in a per curiam opinion dated May 5, 1995. Defendant's application for leave to appeal was denied by the Michigan Supreme Court on December 27, 1995.

Defendant now moves for relief from judgment pursuant to MCR 6.500 *et seq.* Post appeal relief is governed by MCR 6.501 through MCR 6.509. In connection with a motion for relief from judgment, the Defendant has the burden of establishing entitlement to the relief requested. MCR 6.508(D). The Court may not grant relief to the Defendant if the motion alleges grounds for relief which were decided against the Defendant in a prior appeal or proceeding under this subchapter, unless the Defendant establishes that a retroactive change in the law has undermined the prior decision. MCR 6.508(D) (2).

Similarly, the Court may not grant relief if the motion alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the Defendant demonstrates good cause for not bringing the issues forth on appeal and actual prejudice from the alleged irregularities. MCR 6.508(D) (3). Actual prejudice means that, in a conviction following a trial, but for the alleged error, the Defendant would have had a reasonably likely chance of acquittal. MCR 6.508(D) (3) (b) (i). Actual prejudice also means that, in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case. MCR 6.508(D) (3) (b) (iii).

In support of his motion for relief from judgment, Defendant alleges ineffective assistance of trial and appellate counsel and prosecutorial misconduct. Defendant raises the following three issues:

> (1) The prosecution's principle witness, Matthew Edmunds, was, at the time of his testimony, actively psychotic and delusional, having been diagnosed as a paranoid schizophrenic. Defendant claims the prosecution was aware of the witness's history of mental illness but failed to disclose these facts to the defense or the Court. Defendant also argues trial counsel failed to investigate and discover this information, and failed to bring this information to the jury's attention, thereby denying Defendant his right to effective assistance of counsel.
>
> (2) Defendant was himself incompetent to stand trial due to his mental and linguistic impairments. Defendant maintains trial counsel was ineffective by failing to recognize and respond to Defendant's deficiencies. Defendant also maintains appellate counsel was ineffective by failing to properly develop a factual basis necessary to preserve and present the issue for appellate review.
>
> (3) Defendant was denied a fair trial by the erroneous admission and exploitation of testimony indicating that after answering a number of questions during custodial interrogation, Defendant invoked his right to remain silent regarding the events out of which the criminal charges arose. Defendant maintains trial counsel was ineffective by failing to object to this testimony. Defendant further maintains appellate

counsel was ineffective by failing to raise the issue on direct appeal.

Defendant claims the three issues set forth above were not raised or developed on direct appeal and the failure to do so was the result of ineffective assistance of trial and appellate counsel. Defendant also maintains that the prosecution improperly withheld and suppressed evidence concerning Matthew Edmunds' mental history.

After reviewing Defendant's motion and the People's response, in conjunction with the record in this matter, the Court is persuaded an evidentiary hearing is not required for it to rule on Defendant's motion. MCR 6.508(B). As set forth below, the Court makes the following findings of fact and conclusions of law with respect to its disposition of Defendant's motion for relief from judgment. MCR 6.508(E).

The Court first finds Defendant's claim of prosecutorial misconduct and suppression of evidence concerning Matthew Edmunds' history of mental illness is without merit. The record is devoid of any evidence establishing that trial counsel was denied access to medical and/or psychiatric records pertaining to Matthew Edmunds. Additionally, the record belies Defendant's claim that the witness Matthew Edmunds was incompetent to testify by virtue of his mental problems. The trial record reveals Mr. Edmunds was able to answer the questions posed to him in a coherent manner and had the mental capacity to testify at trial.

Furthermore, the Court is not persuaded Defendant was denied the right to effective assistance of counsel where trial counsel declined to question Mr. Edmunds on

his mental condition or history of mental illness. Effective assistance of counsel is presumed and the Defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To find that a Defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a Defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing norms, and that the representation so prejudiced the Defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Prejudice is established by showing that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997). A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *Leonard, supra*, p 592 (quoting from *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996)).

The trial record reveals effective advocacy on behalf of Defendant. In his cross-examination of Mr. Edmunds, trial counsel effectively raised several discrepancies inherent in Mr. Edmunds' testimony. Trial counsel elected a strategy which did not include questioning Mr. Edmunds' mental history, even though the preliminary examination transcript reveals defense counsel's awareness of Mr. Edmunds' mental history. While defense counsel's strategy regarding Mr. Edmunds may now appeal questionable when viewed with the benefit of hindsight, the Court cannot say trial counsel performed below the standards of a reasonably competent attorney.

The Court is not persuaded trial counsel's failure to question Mr. Edmunds regarding his mental history constitutes ineffective assistance of counsel. For this reason, appellant counsel's failure to raise the issue on appeal does not constitute ineffective assistance of appellate counsel. Accordingly, the Court finds Defendant has failed to establish good cause for failure to raise such ground on appeal. As previously stated, relief may not be granted to Defendant in the absence of a showing of good cause. MCR 6.508(D) (3) (a). Consequently, it is unnecessary for the Court to determine whether defense counsel's failure to question Mr. Edmunds' regarding his mental history prejudiced Defendant.

The Court also finds Defendant's claim that he was denied effective assistance of counsel resulting from trial counsel's failure to obtain an interpreter for Defendant and appellate counsel's failure to raise the issue on appeal is without merit. The issue of whether trial counsel's failure to obtain an interpreter for Defendant constituted ineffective assistance of counsel was decided against Defendant in a prior appeal. Appellate counsel raised the issue of Defendant's competency to stand trial due to alleged linguistic barriers. In an unpublished opinion per curiam dated May 5, 1995, the Court of Appeals held that trial " . . . counsel's failure to obtain an interpreter for defendant did not constitute ineffective assistance because the record shows that defendant understood and spoke English." See *People of the State of Michigan v Antonio Ciraulo*, unpublished opinion per curiam of the Court of Appeals, decided May 5, 1995 (Docket No. 161594). Consequently, the Court may not grant relief on this basis as Defendant's motion alleges grounds for

relief which were decided against Defendant in a prior appeal. MCR 6.508(D) (2).

Finally, the Court finds no merit to Defendant's remaining claim that he was denied effective assistance of counsel when trial counsel failed to object to the prosecution's alleged elicitation of testimony concerning Defendant's invocation of the right to remain silent. The Court has reviewed the relevant portions of Detective Steckman's testimony. While the Court recognizes that legitimate issues can arise concerning application of the rule precluding use of a Defendant's post-*Miranda* silence where a Defendant places limits on his willingness to speak with police – see *People v Sholl*, 453 Mich 730, 732-738, 556 NW2d 851 (1996) – the Court finds the facts of this case are similar to *Sholl* and accordingly finds no error warranting reversal occasioned by defense counsel's failure to object to the testimony given by Detective Steckman. See *Sholl, supra*. Detective Steckman's testimony on this point was brief and the issue was not revisited. Moreover, trial counsel's failure to object was a matter of trial strategy and any error occasioned by this choice was harmless. Furthermore, the Court is not persuaded appellate counsel's failure to raise this issue on appeal constitutes ineffective assistance where appellate counsel is not required to raise each and every claim of arguable legal merit. See *People v. Reed*, 449 Mich 375; 535 NW2d 496 (1995).

In conclusion, and for the reasons set forth above, Defendant's motion for relief from judgment is DENIED pursuant to MCR 6.508(D). In compliance with MCR 2.602(A) (3), effective December 1, 1998, the decision of

the Court resolves the last pending claim and closes the case.

IT IS ORDERED.

/s/ Deborah A. Servitto
HONORABLE DEBORAH A. SERVITTO

/al

DATED: February 9, 1999

cc: ROBERT BERLIN
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40 N. Main St., Sixth Floor
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DOMNICK J. SORISE
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Order
Entered: December 27, 1995

Michigan Supreme Court
Lansing, Michigan

[Names Omitted In Printing]
PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO CIRAULO,

Defendant-Appellant.

SC: 103094

COA:161594

LC: 92-000065

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

101219

[SEAL]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 27, 19 95 /s/ Corbin R. Davis

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,	UNPUBLISHED May 5, 1995
Plaintiff-Appellee,	No. 161594 LC No. 92-000065
v	
ANTONIO CIRAULO,	
Defendant-Appellant.	

Before: Michael J. Kelly, P.J., and McDonald and Griffin, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316; MSA 28.548, assault with intent to murder, MCL 750.83; MSA 28.278, assault with intent to rob while armed, MCL 750.89; MSA 28.284, and three counts of possessing a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to four terms of life imprisonment for the murder and assault convictions, and three terms of two years' imprisonment for the felony-firearm convictions, which were to run concurently with each other but consecutively to defendant's other sentences.

Defendant first argues that there was insufficient evidence to support his murder and assault convictions. We disagree. Taken in a light most favorable to the prosecution, see *People* v *Jolly*, 442 Mich 458, 466; 502 NW2d 177

(1993), circumstantial evidence and eyewitness testimony regarding the method and manner of the assaults, defendant's attempt to break open a video machine during the assaults, and the discovery of one victim's empty wallet after the assaults sufficiently supported the convictions.

Defendant next argues that he received ineffective assistance of counsel.

> [T]o find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. [*People* v *Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).]

Because defendant failed to move for a new trial or a hearing on this basis, our review is limited to mistakes apparent on the record. *People* v *Hurst*, 205 Mich App 634, 641; 521 NW2d 797 (1994).

We find all of defendant's claims of ineffective assistance meritless. First, counsel's failure to obtain an interpreter for defendant did not constitute ineffective assistance because the record shows that defendant understood and spoke English. Second, counsel's failure to call defendant as a witness was a matter of trial strategy. *People* v *Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988). Defendant has failed to indicate how his testimony would have affected the outcome of the trial. Finally, counsel's failure to conduct DNA testing also did not deprive defendant of effective assistance of counsel because defendant has not shown on the record how such

testing would have corroborated his version of the events. See *People* v *Turner*, 115 Mich App 247, 250-251; 320 NW2d 57 (1982).

Defendant also argues that he is entitled to a new trial because the jury verdict was the result of judicial coercion following an indication by the jury that they were deadlocked. We disagree. In response to the jury's indication, the trial court simply read an instruction on deadlocked juries that closely followed the standard instruction, CJI2d 3.12. No coercive language was used. Defendant did not object to the instruction. After hearing this instruction, the jury continued deliberations for almost two days. Under these circumstances, we find no evidence of judicial coercion. See *People* v *Bookout*, 111 Mich App 399, 403-404; 314 NW2d 637 (1981). See also *People* v *Hardin*, 421 Mich 296, 315, 321-322; 365 NW2d 101 (1984).

Next, defendant alleges prosecutorial misconduct, pointing first to the prosecutor's reference to defendant's history of mental illness during closing argument. However, the prosecutor apparently made the remark in good faith, the trial court gave an instruction to cure the error, and the evidence against defendant was strong. Under these circumstances, we find no reversible error. See *People* v *Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People* v *Crawford*, 187 Mich App 344, 354-355; 467 NW2d 818 (1991); *People* v *LaPorte*, 103 Mich App 444, 451; 303 NW2d 222 (1981). Because defendant failed to object to the remaining prosecutorial comments challenged on appeal, these claims of prosecutorial misconduct are not preserved for appellate review. *People* v *Biggs*, 202 Mich

App 450, 455; 509 NW2d 803 (1993). A failure to review the claims will not result in manifest injustice.

Finally, defendant contends that the trial court erred in admitting hearsay testimony. Defendant first challenges the testimony of a police officer regarding statements made by the surviving victim within a few minutes of the assaults. However, these statements constituted present sense impressions or excited utterances and were therefore excluded from the rule against hearsay. MRE 803(1) and (2); *People* v *Cross*, 202 Mich App 138, 142; 508 NW2d 144 (1993); *People* v *Houghteling*, 183 Mich App 805, 807; 455 NW2d 440 (1990); *People* v *Hackney*, 183 Mich App 516, 524; 455 NW2d 358 (1990). Defendant also challenges the testimony of a police officer who talked with the surviving victim in the hospital. Because the victim's statements to the officer after the assaults were not admitted for the truth of the matter asserted in them but rather for the purpose of understanding the officer's state of mind, they did not meet the definition of hearsay. MRE 801(c); *People* v *Harris*, 201 Mich App 147, 151; 505 NW2d 889 (1993); *People* v *Eggleston*, 148 Mich App 494, 502; 384 NW2d 811 (1986).

Our holdings on defendant's claims of error render his claim of cumulative error moot.

Affirmed.

/s/ Michael J. Kelly
/s/ Gary R. McDonald
/s/ Richard Allen Griffin

Approved, SCAO

1st copy – Corrections
2nd copy – Corrections (for return)
4th copy – Defendant
5th copy – Prosecutor

STATE OF MICHIGAN 16th JUDICIAL CIRCUIT
Macomb County

JUDGMENT OF SENTENCE COMMITMENT TO CORRECTIONS DEPARTMENT

CASE NO. 92-65-FC

ORI MI-500015J

Court address 40 N. Gratiot
Mt. Clemens, MI 48043

Court telephone no. 313-469-5147

THE PEOPLE OF THE STATE OF MICHIGAN v

Defendant's name, address, and telephone no.

ANTONIO CIRAULO
MACOMB COUNTY JAIL

CTN	SID	DOB
5091-009412-01	0735964E	1/12/51

Prosecuting attorney name Gary W. Kain	Bar no. P15655
Defendant attorney name David Griem	Bar no. P23187

THE COURT FINDS:

1. The defendant, represented by counsel, was found guilty on 9/9/92 of the crimes as stated below.
Date

	CONVICTED BY			CHARGE CODE(S)
Count	Plea*	Court	Jury	CRIME	MCL citation/PACC Code
1			G	MURDER FIRST DEGREE-PREMEDITATED	750/316-A
2			G	MURDER FIRST DEGREE-PREMEDITATED	750/316-A
3			G	ASSAULT WITH INTENT TO MURDER	750/83

*Plea: insert "G" for guilty plea; use "NC" for nolo contendere; use "MI" for guilty but mentally ill.

[ ] 2. The conviction is reportable to the Secretary of State under MCL 257.732.
The defendant's driver license number is: _____

IT IS ORDERED:

3. Defendant is sentenced to the custody of the Michigan Department of Corrections as stated below. This sentence shall be immediately executed.

Count	SENTENCE DATE	MINIMUM Years	Mos.	Days	MAXIMUM Years	Mos.	DATE SENTENCE BEGINS	JAIL CREDIT Mos.	Days	OTHER INFORMATION
1	10/1/92	LIFE – NO PAROLE					10/1/92			Ct. 1 consecutive to Cts. 4, 5, 6.
2	10/1/92	LIFE – NO PAROLE					10/1/92			Ct. 2 consecutive to Cts. 4, 5, 6.
3	10/1/92	LIFE								Ct. 3 concurrent to Cts. 4, 5, 6.

[ ] Defendant shall pay restitution of $_____.

4. Court recommendation:

10/2/92 /s/ Deborah A. Servitto P34427
Date Judge DEBORAH A. SERVITTO Bar no.

Under MCL 769.16a the clerk of the court shall send a copy of this order to the Michigan State Police Central Records Division to create a criminal history record.

I certify that this is a correct and complete abstract from the original court records. The sheriff shall, without needless delay, deliver defendant to the Michigan Department of Corrections at a place designated by the department.

(SEAL) /s/ Denise Mente
Deputy court clerk

CC 219b (4/89) JUDGMENT OF SENTENCE, COMMITMENT TO CORRECTIONS DEPARTMENT

MCR 6.427(A)

COURT

Approved, SCAO

1st copy – Corrections
2nd copy – Corrections (for return)
4th copy – Defendant
5th copy – Prosecutor

STATE OF MICHIGAN 16th JUDICIAL CIRCUIT
Macomb County

JUDGMENT OF SENTENCE COMMITMENT TO CORRECTIONS DEPARTMENT

CASE NO. 92-65-FC

ORI MI-500015J

Court address 40 N. Gratiot
Mt. Clemens, MI 48043

Court telephone no. 313-469-5147

THE PEOPLE OF THE STATE OF MICHIGAN	v	Defendant's name, address, and telephone no.
		ANTONIO CIRAULO MACOMB COUNTY JAIL

CTN	SID	DOB
5091-009412-01	0735964E	1/12/51

Prosecuting attorney name	Bar no.
Gary W. Kain	P15655
Defendant attorney name	Bar no.
David Griem	P23187

THE COURT FINDS:

1. The defendant, represented by counsel, was found guilty on 9/9/92 of the crimes as stated below:
Date

Count	CONVICTED BY Plea*	Court	Jury	CRIME	CHARGE CODE(S) MCL citation/PACC Code
4			G	Weapons Felony Firearm	750/227B-A
5			G	Weapons Felony Firearm	750/227B-A
6			G	Weapons Felony Firearm	750/227B-A
7			G	Assault w/Intent to Rob Armed	750/89

*Plea: insert "G" for guilty plea; use "NC" for nolo contendere; use "MI" for guilty but mentally ill.

[ ] 2. The conviction is reportable to the Secretary of State under MCL 257.732.

The defendant's driver license number is: _____

IT IS ORDERED:

3. Defendant is sentenced to the custody of the Michigan Department of Corrections as stated below. This sentence shall be immediately executed.

Count	SENTENCE DATE	MINIMUM Years	Mos.	Days	MAXIMUM Years	Mos.	DATE SENTENCE BEGINS	JAIL CREDIT Mos.	Days	OTHER INFORMATION
4	10/1/92	2					10/9/92		366	Cts. 4, 5, 6 to run concurrent with each other.
5	10/1/92	2					10/9/92		366	
6	10/1/92	2					10/9/92		366	
7	10/1/92	LIFE								Ct. 7 to run consecutive to Cts. 4, 5, 6.

[ ] Defendant shall pay restitution of $_____ .

4. Court recommendation:

10/2/92 /s/ Deborah A. Servitto P34427
Date Judge DEBORAH A. SERVITTO Bar no.

Under MCL 769.16a the clerk of the court shall send a copy of this order to the Michigan State Police Central Records Division to create a criminal history record.

I certify that this is a correct and complete abstract from the original court records. The sheriff shall, without needless delay, deliver defendant to the Michigan Department of Corrections at a place designated by the department.

(SEAL) /s/ Denise Mente
Deputy court clerk

CC 219b (4/89) JUDGMENT OF SENTENCE, COMMITMENT TO CORRECTIONS DEPARTMENT

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COURT